

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BUNGIE, INC., a Delaware corporation,

Plaintiff

v.

AIMJUNKIES.COM, a business of unknown
classification; PHOENIX DIGITAL GROUP
LLC, an Arizona limited liability company;
JEFFREY CONWAY, an individual; DAVID
SCHAEFER, an individual; JORDAN GREEN,
an individual; and JAMES MAY, an individual,

Defendants.

Cause No. 2:21-cv-0811 TSZ

**DEFENDANTS' MOTION FOR
RELIEF FROM DEADLINE
FOR DISCLOSURE OF
EXPERT TESTIMONY**

**Note on Motion Calendar:
May 12, 2023**

For reasons stated herein, Defendants, by and through their undersigned counsel, respectfully request that the date for disclosing expert testimony relating to Defendants' Counterclaims be extended from November 21, 2022 to May 26, 2023.

This request is made in light of the following:

1. This Court's June 14, 2022 Scheduling Order (Dkt#33) set November 21, 2022 as the deadline for Disclosure of expert testimony under FRCP 26(a)(2).

2. It was not until February 3, 2023 that this Court ordered (Dkt.# 84) that Defendants' amended counterclaims could proceed.

3. Prior to then, Plaintiff Bungie refused to provide discovery into matters relating to the counterclaims on the basis that such discovery was not relevant to any of the pending issues. Furthermore, Bungie's Motion to Dismiss Defendants' Amended

1 Counterclaims (Dkt#74) itself makes several factual allegations that this Court noted would
2 likely be addressed during a motion for summary judgment.

3 4. Although this Court in its February 14, 2023 Minute Order (Dkt#86) set back
4 the trial date by approximately six month and extended other dates, the order did not change
5 the previously set deadline of November 21, 2023 for disclosing expert testimony.

6 5. After this Court's February 3, 2023 Order allowing Defendants' counterclaims
7 to proceed, Defendants' served discovery requests directed to those counterclaims. On April
8 13 and May 1, 2023 Bungie responded to those discovery requests.

9 6. The deadline for disclosing expert testimony relating to the counterclaims
10 should be extended in order to permit Defendants' Expert to analyze the information provided
11 by Bungie for the first time in April and May, 2023, long after the prior November 21, 2023
12 deadline, which could not have been done earlier in light of Bungie's motions to dismiss
13 Defendants' counterclaims.

14 7. This Court has wide discretion to extend the date for expert disclosure and
15 should extend the date where justice so requires and no prejudice will result.

16 8. Prejudice will result if Defendants are not provided an opportunity to present
17 expert testimony related to their counterclaims. In particular, Bungie alleges it did not
18 conduct any sort of investigation into the alleged "Cheat Software" at issue here and, in
19 particular, conducted no technical analysis of the "Cheat Software" as doing so would violate
20 the applicable Terms of Service imposed by Defendant Phoenix Digital. Document produced
21 by Bungie and designated by Bungie as "Highly Confidential," however, demonstrate
22 otherwise. Because Bungie has labeled these documents "Highly Confidential," they cannot
23 under the terms of the applicable protective order be shared with Defendants. As Defendants
24 cannot see and address them directly and only can do so by way of expert testimony, denying
25 an opportunity for Defendants to present expert testimony as to these issues arising after
26 expiration of the prior expert disclosure deadline will work a hardship and injustice on
27 Defendants. Extending the deadline, however, will not materially prejudice Bungie,
28 particularly where, as here, Bungie has done its best to stymie Defendants' counterclaims.

1 9. Significantly, on April 21, 2023, five months after the November 21, 2022
2 deadline for serving expert reports, Bungie, itself, served the “supplemental” report of its
3 expert, Mr. Drew Voth, addressing issues relating to the counterclaims. To date, Bungie has
4 offered no explanation as to why these matters could not have been addressed by the
5 November 21, 2023 deadline.

6 For all the foregoing reasons, Defendants respectfully request that deadlines for
7 serving expert disclosures relating to Defendants’ counterclaims be filing discovery motions
8 and completing discovery into the counterclaims be extended to May 26, 2023. Such action
9 by this Court is respectfully requested.

10 **CERTIFICATION UNDER RULE 26(C)(1)**

11 On April 11, 12, 17 and May 3, 2023, Plaintiff’s counsel, Mr. William Rava and I
12 exchanged a series of emails regarding the issues raised in this motion, but despite good faith
13 efforts could not reach agreement. Undersigned counsel offered to speak by telephone
14 regarding these issues but Mr. Rava indicated such would not be necessary, and that Bungie
15 would not accuse Defendants of having failed to comply with Rule 26(C)(1).

16 Dated May 4, 2023.

17 /s/ Philip P. Mann

18 Philip P. Mann, WSBA No: 28860

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